UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

THE DETROIT NEWS, INC.
and DETROIT NEWSPAPER PARTNERSHIP, L.P.,
a limited partnership, a/k/a
DETROIT MEDIA PARTNERSHIP and
THE DETROIT NEWS, INC.,

Respondents

-and- **Case No. 7-CA-132726**

THE DETROIT FREE PRESS, INCORPORATED,
and DETROIT NEWSPAPER PARTNERSHIP, L.P.,
a limited partnership, a/k/a
DETROIT MEDIA PARTNERSHIP (Respondent DMP), and
THE DETROIT NEWS, INC.,

Respondents **Case No. 07-CA-132729**

NEWSPAPER GUILD OF DETROIT, LOCAL 34022
OF THE NEWSPAPER GUILD/CWA, AFL-CIO

Charging Union

RESPONDENT THE DETROIT NEWS, INC.'S ANSWERING BRIEF IN OPPOSITION TO THE GENERAL COUNSEL'S CROSS-EXCEPTIONS

VERCRUYSSE MURRAY, P.C.
By: Robert M. Vercruysse (P21810)
Gary S. Fealk (P53819)
Bernice McReynolds (P44019)
31780 Telegraph Road, Suite 200
Bingham Farms, MI 48025-3469
(248) 540-8019
Attorneys for Respondent,
The Detroit News, Inc.

INTRODUCTION

In this case, Respondent DMP sold its Downtown Detroit building and adjacent parking facilities and Respondents' offices were relocated to a rented Detroit location. The ALJ held that Respondents violated the Act by failing to bargain over the effects of the sale/relocation on parking. Respondents filed exceptions to this and other findings by the ALJ. The ALJ, however, held that Respondents had no obligation to engage in bargaining over the decision to sell the facilities and relocate, which necessitated a change in parking. The General Counsel has filed cross-exceptions contending that the ALJ erred by failing to find that Respondents Detroit News, Inc. ("News"), the Detroit Free Press Incorporated ("Free Press"), and the Detroit Newspaper Partnership, L.P. ("DMP"), violated the Act by failing to bargain over the "decision" to make changes to parking. Counsel for the General Counsel further argues in her cross-exceptions that the ALJ erred by failing to find that Respondents "undermined and bypassed" the union and by failing to order a full make-whole remedy. As shown, below, the record evidence and established legal precedent provide no support for the General Counsel's cross-exceptions.

STATEMENT OF FACTS

Respondent Detroit News provided a comprehensive factual summary set forth in its Brief in support of its exceptions and incorporates that statement of facts by reference rather than duplicatively repeating it here. However, some of the undisputed relevant facts that relate to the General Counsel's cross-exceptions are highlighted as necessary in the argument section below.

ARGUMENT

A. The ALJ Properly Held that Respondent DMP had the Right to Sell its Building and Parking Facilities

Counsel for the General Counsel alleges that the ALJ failed to rule on complaint allegations regarding "decisional bargaining." This argument is groundless and is contrary to the facts presented at the hearing. It is important to recognize that the Counsel for the General Counsel generally mischaracterizes the "decision" at issue in this case as a "decision to change the parking location and costs," ignoring that fact that the "decision" that was made in this case was to sell 615 W. Lafayette and the parking facilities and relocate the business. Prior to the move, the DMP owned parking facilities and obtained revenue from charging employees, including bargaining unit employees, a $25 or $30 per month fee for parking privileges. After the sale of the lots, the DMP had no parking facilities to rent to employees, and had no obligation to provide parking to employees. (Tr. 4 Brown 855, Behan 877) In fact, the contract between the Charging Party (the "Guild") and the News states that parking is not a benefit that must be maintained during the life of the contract. (Jt. Ex. 2, p. 23) After the sale of the facilities, there was no parking lot owned by the DMP in which Respondents could rent parking spaces to employees. This case is, and always has been, a dispute as to whether the Respondents had an obligation (and/or fulfilled any alleged obligation) to bargain over the effects of the decision to relocate and sell the parking facilities. As discussed below, the Guild admitted numerous times during the hearing that they had only requested Respondents to engage in effects bargaining.

In her Brief in Support of Cross-Exceptions, Counsel for the General Counsel argues that the Complaint alleges that Respondent's failed to bargain over the "decision" to make

changes to parking but that the ALJ failed to address it. However, the Complaint does not sufficiently place the parties on notice that the General Counsel is alleging a failure to engage in decisional bargaining. Counsel for the General Counsel relies on paragraphs 11 and 17 of the Complaint in support of her assertion that decisional bargaining was raised as an issue in this case. The Complaint allegations state:

> 11. (a) On or about June 16, 2014, Respondents, by Joyce Jenereaux and Mark Brown, at Respondents' Detroit facility, announced to Unit employee new parking policies and procedures, including locations and costs.
>
> (b) On or about October 27, 2014, Respondents implemented the new parking policies and procedures described in paragraph 11(a).

The General Counsel argues that by alleging in paragraph 17 of the Complaint that by the "conduct and effects of this conduct" described in paragraph 11, Respondents' violated the Act, that this was an adequate allegation that Respondents failed to engage in decisional bargaining. There is no indication in these paragraphs that it is the "decision" to sell the building and parking lot and relocate Respondents' offices that is at issue. The issue raised in the Complaint was that Respondents failed to engage in effects bargaining as it related to parking.

1. There was No Request to Bargain over the Decision Because the Guild Recognized that the Decision was not a Mandatory Subject

Even if the Complaint had adequately alleged a failure to bargain over the decision, there is no record evidence that the Guild ever sought to bargain over the decision. In fact, all of the evidence cited by Counsel for the General Counsel in her brief indicates that the Guild was seeking effects bargaining. Counsel for the General Counsel cites the Guild's Chief Administrative Officer Louis Grieco's June 10, 2014 e-mail as evidence that the Guild requested to bargain over the "decision" to make changes in parking. This e-mail directly

contradicts the General Counsel's position that the Guild sought to engage in decisional bargaining. The June 10, 2014 e-mail states:

> As you can probably imagine, our members are quite concerned about parking after the move, which is only three months away. Of course, **the Guild has the right to bargain the effects of the move, which would include any change in parking arrangements or costs.**

(Jt. Ex. 4, Emphasis added) Louis Grieco also testified about this e-mail and again admitted that the Guild's position was only that it had the right to bargain about the effects of the move on parking, and not the sale of the building and parking lots.

> Q. And the Free Press. Okay. And I'm particularly interested in the second sentence of your e-mail which says, "Of course, the Guild has the right to bargain the effects of the move," right?
>
> A. Yes.
>
> Q. Okay. So you weren't bargaining the company's decision to actually move from its old facility to its new facility, correct?
>
> A. No.
>
> Q. Okay. That's a legitimate management activity, right?
>
> A. I would think so, yes.
>
> Q. Okay. It's not something about which the company has to bargain, right?
>
> A. Not to my knowledge.

(Tr. 3 Grieco 628) Unbelievably, the General Counsel cited this testimony as evidence that Grieco was seeking decisional bargaining.

Counsel for the General Counsel also alleges that Grieco's subsequent June 16, 2014 e-mail requesting bargaining is evidence that the Guild requested decisional bargaining, but this e-mail clearly states that it is in reference to his previous June 10, 2014 e-mail that refers only to "bargaining the effects". (Jt. Ex. 8 and GC Ex. 29)

The only other testimony cited by the General Counsel regarding the issue of whether the Guild requested bargaining over the decision to make changes to parking is Grieco's testimony on page 631. This testimony relates to Joint Ex. 35, Grieco's communication to members, in which he states: "The Union also has a right to demand bargaining over the effects of a legitimate management decision, such as the decision to change the location of the office. This remains the Guild's position." (Jr. Ex. 35) Grieco also testified on pages 630-631:

> Q. Okay, great. Now, fourth full paragraph at the bottom of the first page.
>
> A. Last paragraph on the page. Okay.
>
> Q. Third line from the bottom, "The Union also has the right to demand bargaining over the effects to the employees of a legitimate management decision." You wrote that, right?
>
> A. I did.
>
> Q. Now, going over some of these communications from you, you discussed it as effects bargaining, you describe it as effects bargaining?
>
> A. I did.
>
> Q. That was your decision to use that word, correct?
>
> A. Yes.

(Tr. 3 Grieco 630-631) There is nothing in this record evidence, nor anywhere else in the record, that supports the General Counsel's position that the Guild sought to bargain over the decision. The Guild recognized this as a non-bargainable decision and requested effects bargaining as it related to parking. This case is and always has been an effects bargaining case and nothing more.

2. The ALJ Clearly and Properly Addressed the Issue of Decisional Bargaining

Contrary to the General Counsel's allegation that the ALJ "ignored" the decisional bargaining allegation, the ALJ explicitly ruled that there was no obligation to bargain over the decision to relocate the business, and parking and that issues related to cost and location of bargaining were effects of the decision to relocate the business. The ALJ cited well-established

case law holding that there is no obligation to bargain over certain management decisions, and distinguishing an obligation to engage in decisional bargaining from an effects bargaining obligation:

> An employer violates Section 8(a)(5) and (1) of the Act if it changes the wages, hours or terms and conditions of employment of represented employees without providing the Union with prior notice and an opportunity to bargain over such changes. See *NLRB v. Katz*, 369 U.S. 736, 743, 747 (1962). Those changes are mandatory subjects of bargaining if the change has a "material, substantial, and significant" impact on the terms and conditions of bargaining unit members. *Flambeau Airmold Corp.,* 334 NLRB 165, 165 (2001), citing *Alamo Cement Co.,* 281 NLRB 737, 738 (1986); *Carrier Corp.*, 319 NLRB 184, 193 (1995), citing *United Technologies Corp.*, 278 NLRB 306, 308 (1986).
>
> An employer's duty to bargain with the union over mandatory subjects includes a duty to bargain about the effects on employees of a management decision that is not itself subject to the bargaining obligation. See *First National Maintenance Corp. v. NLRB,* 452 U.S. 666, 677, 679–682 (1981); *Litton Business Systems,* 286 NLRB 817, 819–821, 1133–1134 (1987), enfd. In relevant part 893 F.2d 1128, 1133–1134 (9th Cir. 1990), cert denied in relevant part 498 U.S. 30 966 (1990), revd. in part on other grounds 501 U.S. 190 (1991); *Holly Farms Corp. v. NLRB,* 48 F.3d 1360, 1368 (4th Cir. 1995), cert granted on other grounds 516 U.S. 963 (1995), affd. 517 U.S. 392 (1996). In most such situations, "[t]here are alternatives that an employer and a union can explore to avoid or reduce the scope of the [effects] without calling into question the employer's underlying decision. See *Bridon Cordage Inc.,* 329 NLRB 258 (1999).
>
> The Board has held that "[a]n employer has an obligation to give a union notice and an opportunity to bargain about the effects on union employees of a managerial decision even if it has no obligation to bargain about the decision itself." *Allison Corp.*, 330 NLRB 1363, 1365 (2000) citing *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 681–682 (1981); *Good Samaritan Hospital,* 335 NLRB 901 (2001). The employer has a duty to give pre-implementation notice to the union in order to allow for meaningful effects bargaining. *Allison Corp.*, *supra* at 1366. It is well settled that Section 8(a)(5) requires effects bargaining to be conducted "in a meaningful manner and at a meaningful time . . . ." *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 681–682 (1981). Effects bargaining must occur sufficiently before actual implementation of the decision so that the union is not presented with a fait accompli. *Komatsu America Corp.*, 342 NLRB 649, 649 (2004).

(ALJ Decision p. 16) The ALJ then held, based on the facts of this case, that Respondents had no obligation to bargain over the decision to sell the building and parking facilities and relocate

the business, but nevertheless had an obligation to bargain over the effects of the decision to the extent that impacted parking.[1]

> I find that Respondent DMP had the right to make the management decision to relocate the businesses – when to move, where to move, and related matters including whether to purchase or lease the new facility and parking lots. However, certain potential effects of that decision are material, substantial and significant—in this instance, much of the parking lot policy, i.e., monthly rate, based on salary, costing much more than the prior location and erasing the newly-gained wage increases, requiring an annual commitment, and assigning garages by seniority. Those aspects of the new parking policy significantly disadvantaged employees, compared to the old location.
>
> I find that the above-noted changes to the parking policy are material, substantial and significant changes. They are, therefore, mandatory subjects of bargaining, and the Respondents had an obligation to bargain with the Union over those effects of the relocation.

(ALJ Dec. P. 18) Counsel for the General Counsel's position that the ALJ did not address the issue of whether there was an obligation to bargain over the "decision" is groundless.

In her Brief in Support of Cross-Exceptions (pp. 12-13), Counsel for the General Counsel cites several cases that purportedly support of her position that Respondents were required to bargain over the decision. *Mail Contractors of America*, 347 NLRB 1158 (2006) is not relevant here, as *Mail Contractors* did not involve the decision to sell parking facilities that necessitated a change in parking. Rather, that case involved allegations that an employer changed certain relay points that had a direct effect on the wages earned by employees. *Pessoa Construction Company*, 356 NLRB No. 157 (2011), concerned a change in day-to-day working conditions, not the sale of the employer's parking facilities. *United Parcel Service,* 336 NLRB 1134 (2011) is a case related to the relocation of parking facilities, where, as here, there was no allegation that the decision to relocate parking was unlawful. *Id. fn.* 6 *United Parcel Service* was strictly an effects bargaining case. Moreover, it should be noted that despite a finding that the

[1] Respondent News excepted to the finding that they had an obligation to engage in effects bargaining for the reasons (e.g. past practice, waiver, etc.) set forth in its Brief in Support of Exceptions.

employer failed to bargain over the effects of the relocation of the employee parking lot, no *Transmarine* remedy was issued in *United Parcel Service*.

Again, this is not a case involving a simple "decision" to change a parking policy as the General Counsel now alleges. The parking arrangement was that DMP would lease space in lots that it owned for $25 or $30 per month and receive monthly parking revenue from employees. The decision at issue was DMP's decision to sell 615 W. Lafayette and the lots and to relocate the office. Due to that sale and relocation of the office, there was no parking facility owned by the DMP. The issue the Guild raised was that it wanted to bargain over the effects of that decision on employee parking. When the relocation of business is at issue, there is no obligation to bargain over the decision when labor costs were not a factor in the decision. *Prof. Med. Transport., Inc,* 362 NLRB No. 19 (2015)(ALJ Decision) *citing Mercy Health Partners*, 359 NLRB No. 69 (2012) Here, the Guild only sought to bargain over the effects and even admitted that Respondents had no obligation to bargain over the decision. (Tr. 3 Grieco 628) The General Counsel's exception with regard to the obligation to bargain the decision to move must, therefore, be denied.

B. The ALJ Did Not Err by Failing to Find that Respondents Bypassed and Undermined the Union

The ALJ found that Respondents engaged in unlawful direct dealing by the June 16, 2014 e-mail communication to employees, including union officials, regarding the opt-in date for participation in parking opportunities.[2] However, the General Counsel claims that the ALJ should have also ruled that this action "undermined and bypassed the union." The ALJ's failure to include language in her conclusions that the Respondents undermined and bypassed the Guild was not an error. Regardless of the direct dealing finding, which Respondents dispute, there is

[2] The News, as argued in its Brief in Support of its Exceptions, maintains that the ALJ erred in finding that it engaged in unlawful direct dealing.

no dispute that after requesting bargain, Respondents met with the Guild and bargained until the Guild terminated bargaining and made no further proposals. (Tr. 3 Grieco 649-50; Tr. 4 Behan 881-82, 900) Union Chief Administrative Officer, Louis Grieco, also admitted in his communication to members that Respondents made a concession. (Jt. Ex. 35) Thus, the evidence does not support the General Counsel's contention that Respondents bypassed and undermined the Guild.

C. No Make-Whole Remedy Should Issue

The General Counsel argues that a full make-whole remedy should have been issued, rather, than a limited back-pay *Transmarine* remedy. As discussed in the News' Brief in Support of Exceptions, even if a violation of the Act were to be found, a *Transmarine* remedy is inappropriate because such a remedy presupposes what the parties would have agreed to in effects bargaining regarding parking. Section 8(d) of the Act does not require any party to agree to any proposal or make any concession in bargaining. *H.K. Porter v. NLRB*, 397 U.S. 99, 102 (the United States Supreme Court held that, "while the [NLRB] does have power . . . to require employers and employees to negotiate, it is without power to compel a company or a union to agree to any substantive contractual provision . . . .").

A make-whole remedy would have even more egregiously violated Section 8(d) and *H.K. Porter.* There simply was no parking for the DMP to lease to employees for $25 or $30 per month after the move as the DMP did not own any lots. The make-whole remedy as suggested by the General Counsel would require Respondents to expend a great deal of money to reimburse Guild employees for their decision to park in third-party lots, which is what the Guild sought in effects bargaining but was unable to achieve. Prior to the move, the DMP received revenue from renting parking spaces – it had no expense of subsidizing employee

parking. Also, under the clear terms of the News/Guild contract, the News had no obligation to maintain any parking benefit during the term of the agreement. (Jt. Ex. 2, p. 23) The remedy sought by the General Counsel is not 'make whole" but is an attempt to impose contract terms on the Respondents that it never agreed to, which is a clear violation of Section 8(d) and *H.K. Porter.*

CONCLUSION

The ALJ explicitly and properly held that Respondents did not have an obligation to bargain over the decision to sell the building and parking facilities and relocate. The General Counsel presented no evidence that the Guild ever requested to bargain over the decision – it only requested bargaining over the effects of the sale on parking. This case is, and always has been, a dispute about effects bargaining. There is also no evidence that the Respondents "undermined and bypassed" the union. As soon as the Guild requested effects bargaining, even though Respondents had no obligation to do so, Respondents met with and bargained with the Guild over parking until the Guild terminated bargaining. The General Counsel's claim that the ALJ erred by failing to order a full make-whole remedy should also be rejected. The imposition of a *Transmarine* remedy was a violation of 8(d) as it presupposes what the parties might have agreed to in bargaining, and a make-whole remedy would even more egregiously violate 8(d). There is no way to put the parties back in the position they were in before the sale of the parking facilities – the Respondents do not own parking lots and prior to the move were receiving revenue from renting parking to employees. There was never any agreement by the Respondents to expend money to subsidize parking down to $25 or $30 in third-party lots and the Guild/News agreement explicitly states that the News has no obligation to provide a parking benefit. Imposing a parking benefit violates 8(d).

For these reasons, and the other reasons discussed above, the Board should reject the General Counsel's Cross-Exceptions.

VERCRUYSSE MURRAY, P.C.

By: Robert M. Vercruysse

Robert M. Vercruysse (P21810)
Gary S. Fealk (P53819)
Bernice McReynolds (P44019)
Attorneys for Respondent,
The Detroit News, Inc.
31780 Telegraph Road, Ste. 200
Bingham Farms, MI 48025-3469
(248) 540-8019

Dated: November 23, 2015

PROOF OF SERVICE

Jacki Barnes, being first duly sworn, deposes and says that she is employed by the law firm of Vercruysse Murray, P.C. attorneys for the Respondent Detroit News, Inc. that on the 23rd day of November, 2015, she electronically filed with the Executive Secretary and served a copy of the foregoing documents along with this Proof of Service on:

Ingrid Kock
General Counsel for the
National Labor Relations Board
477 Michigan Avenue, Rm 300
Detroit, MI 48226-2569

Mr. Duane F. Ice
Law Office of Duane F. Ice
26611 Woodward Avenue
Huntington Woods, MI 48070-1332

L. Michael Zinser
Glenn E. Plosa
The Zinser Law Firm, P.C.
414 Union Street, Suite 1200
Nashville, Tennessee 37219

by depositing it in a U.S. Mailbox with correct postage thereon. Further deponent sayeth not.

Jacki L. Barnes